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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

149

HUBERT WREN,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

I. Opinions Below 1

II. Counter-Statement of the Case 2

III. Lack of Jurisdiction 3

IV. Question Presented 6

V. Statutes Involved 6

VI. Argument 6

VII. Summary 11

TABLE OF CASES

American Surety Co. v. Baldwin, 287 U.S. 156, 77 L. ed 231 (1932) 5

Alchafalaya Land Co. v. Williams Cypress Co., 258 U.S. 188, 66 L. ed 559, (1921) 9

Chapin v. Frye, 179 U.S. 126, 45 L. ed 119, (1900) 10

Edelman v. California, 344 U.S. at 358, 97 L. ed 387, (1952) 5

Hartford Life Insurance Co. v. Johnson, 249 U.S. 490, 63 L. ed 725, (1919) 4

State v. Tharp, 42 Wn.(2d) 494, 256 P.(2d) 482, (1953) 4

United States v. Dickinson, 331 U.S. 745, 91 L. ed 1789, (1947) 10

Van Sant v. Seattle, 47 Wn.(2d) 196, 287 P.(2d) 130, (1955) 8

Winon's Point Shooting Club v. Casperson, 193 U.S. 188, 48 L. ed 675, (1903) 10

TABLE OF AUTHORITY

United States Supreme Court Rule 23(F) 3

Revised Code of Washington 4.16.020 10

Cooley's Constitutional Limitations, Seventh Ed., Chap. XI, pp. 520-521 (1903) 9

Volume 16 A. Corpus Juris Secundum; Constitutional Law, Sec. 615 8

Thompson on Real Property, Volume 1, Sec. 352 and 415 7

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I.

OPINIONS BELOW

Respondent approves and has nothing to add to Petitioner's CITATIONS TO OPINIONS BELOW, Paragraph I of Petitioner's Brief in support of Petition for a Writ of Certiorari to the Supreme Court of the State of Washington.

II.

COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case is generally acceptable considering the limited scope of his petition. Respondent would clarify and make minor additions as follows:

Petitioner alleges in his statement of the case that:

> "The State has never acquired or attempted to acquire the land traversed by the highway by condemnation proceedings."

This statement goes considerably beyond the record in that the only evidence admitted in the trial court on the particular point is the testimony of Charles Gleiser, an employee of the Commonwealth Title Insurance Company. His testimony was of course restricted to information gleaned from examination of his company records. (St. 37-47). His testimony indicates the possibility of missing instruments. (St. 45).

The trial court also found that the activities of petitioner in blocking a heavily traveled highway created a serious situation, i.e., "a nuisance of the most dangerous character." (St. 60).

This finding was based on evidence produced by witnesses called by the Respondent who testified that a post had been placed on or next to the traveled portion of the highway in question. Some of the blacktop surfacing was removed in the process. A post-hole had been dug on the opposite side of the roadway and the petitioner had in his possession sufficient telephone wire to stretch between the posts when placing was completed. A no-trespassing sign had been affixed to the erected post and the petitioner was seen waving a red flag at South bound traffic and pointing to the sign. Petitioner placed

a limb from a tree, measuring four or more inches in diameter at the butt and twelve or more feet in length, so as to block any traffic approaching from either direction. (St. 8-11, 21-23, 31-32).

Respondent believes that petitioner's statement of the case as supplemented above substantially states the facts material to this review.

III.

LACK OF JURISDICTION

Petitioner in Paragraph 2, "Jurisdiction," and Paragraph 6, "Federal Question Raised," has failed to comply with Supreme Court Rule 23 (f) which provides:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify *the stage in the proceedings in the court of first instance* and in the appellate court, *at which and the manner in which, the federal questions sought to be reviewed were raised; the method of raising* them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears* (e.g., ruling on exception, portion of the court's charge and exceptions thereto, assignment of error) *as will show that the federal question was timely and properly raised* so as to give the court of jurisdiction to review the judgment and writ of certiorari * * * " (Emphasis supplied).

Petitioner forthrightly concedes in Paragraph 6, "Federal Question Raised," that such question was not raised prior to his petition for rehearing to the State Supreme Court.

A literal reading of the cited appeal Rule forces the conclusion that the Federal question was not *timely and properly raised* in the case at bar. The rule clearly envisions notice to the state courts of the Federal question so that this court may be apprised of their rulings thereon.

We are not, however, restriced to a literal interpretation of the said rule, there being considerable authority to bolster Respondent's position. In *Hartford Life Insurance Co. v. Johnson,* 249 U.S. 490, 63 L. ed 725 (1919) this court in dismissing a writ of certiorari on motion of the Respondent said:

> "The jurisdiction of this court to review the final judgment or decree of a state, in such a case as we have here is defined in Sec. 237 of the Judicial Code (36 State. at L. 1157, Chap. 231), as amended September 6th, 1916 (39 Stat. at L. 726, Chap. 448, Comp. Stat. 1916, Sec. 1214), which provides that it shall be competent for this court by certiorari, to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege, or immunity under the Constitution of the United States and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution. It is settled law that this provision means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action, under the state system of pleading and practice. * * *"

In the cited case the law of the State of Missouri provided that the particular question would not be considered on appeal unless raised in the trial court.

In *State v. Tharp,* 42 Wn.(2d) 494, 256 P.(2d) 482, (1953) the Supreme Court of the State of Washington

in refusing to consider alleged error not called to the attention of the trial court, said:

> "We have repeatedly said that the burden of preventing trial errors rests squarely upon counsel for both sides. Counsel must state the reason why the court is in error in time to allow the court to correct it. A party cannot secrete an error for use upon appeal in case the verdict goes against him."

American Surety Co. v. Baldwin, 287 U.S. 156, 77 L. ed 231, (1932) is a case directly in point. There the alleged Federal question was raised for the first time by a petition for rehearing of an appeal before the Supreme Court of the State of Idaho. The question, as here, had been raised as a matter of state law in the trial court and on appeal. The petition was denied without comment. The factual similarity between the cited case and the case at bar is noteworthy. The Supreme Court of the United States dismissed the writ of certiorari saying that the Federal claim was not seasonably made, having been raised throughout the proceedings solely as a matter of state law.

This court held in *Edelman v. California*, 344 U.S. 357 at 358, 97 L. ed 387 (1952):

> "It is clear that this court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

Petitioner concedes that the alleged Federal question was first raised in his petition for rehearing in the State Supreme Court, which petition was denied without comment by said court.

It is submitted that the cited Washington and United States Supreme Court authorities are controlling on the facts of this case. The alleged Federal question

was not, in the language of *Hartford Life Insurance Co. v. Baldwin, supra,* "asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the State system of pleading and practice." Under the said authorities this court lacks jurisdiction to grant the writ of certiorari.

IV.

QUESTION PRESENTED

Respondent accepts the Petitioner's statement of the Question Presented as complete for the purpose of this review.

V.

STATUTES INVOLVED

Respondent accepts the Petitioner's statement of and quotations from the pertinent statutes as complete for the purpose of this review.

VI.

ARGUMENT

Petitioner argues that the decisions of the Supreme Court of the State of Washington that the state may acquire property by prescriptive easement is in conflict with the United States Constitution and more particularly with the due process clause of the Fourteenth Amendment and the last provision of the Fifth Amendment which provides that:

> "no private property shall be taken for public use without just compensation."

Petitioner alleges his belief that this is a case of first instance before this court. To the extent that Respondent has not discovered any case precisely in point we would agree. However, the underlying principles have previously been the subject of judicial inquiry by this court and furnish a practical guide for resolving the question herein at issue.

The general rule throughout the states supports Respondent's position that a state may acquire property by prescriptive easement. *Thompson on Real Property,* Volume 1, Sec. 352, sets out the rule as follows:

> "As a general rule an easement can only be created by a grant, express or implied, or by prescription from which a grant is presumed."

Thompson on Real Property, Volume 1, Sec. 415, discusses the presumption of lost grant in the following manner:

> "The presumption of the grant of an easement, when indulged, is because the conduct of the other party, in submitting to the use for so long without objection, cannot be accounted for on any other hypothesis."

The State of Washington bases the prescriptive easement on an implied dedication, such dedication being implied from the benefits accruing to property owners when public highways are built and maintained giving the property owner better access to other areas. *Van Sant v. Seattle,* 47 Wn.(2d) 196, 287 P.(2d) 130 (1955).

It is submitted that whether the concept of prescriptive easement is based on implied grant or presumption of lost grant is not material. The rationale is fictional in any event. It is, however, based on the realistic conclusion that when a person's property is benefited by increased accessibility, and where the owner accepts the

benefit without enforcing his rights during the statutory period, then he must be in sympathy with the taking. It is not therefore a fiction which is used to deprive persons of Constitutional rights, but one which gives legal meaning to the usual intentions in such cases.

These rules spring from the logical inference that if there were no grant or dedication, the owner would have put an end to the wrongful occupation before the full period of limitation had expired.

The reasoning generally supporting any statute of limitation is worthy of consideration and comment. The principle objective is the protection of long established positions and a relatively prompt termination of controversies. Prominent among the reasons for which such a termination is deemed desireable is the protection against loss through the dissipation by lapse of time of the evidence surrounding a particular happening or transaction.

So much for the general law of prescriptive easement. What if anything in this court's decisions support the Respondent's position that neither the Fifth or Fourteenth Amendments are violated by the doctrine that the public can acquire an easement by prescription.

Volume 16 A. Corpus Juris Secundum, Constitutional Law, Sec. 615, discusses the problem as follows:

> "While the requirements of due process of law apply to limitations or suspension of remedy, such limitation or suspension does not deprive one of property without due process if it is reasonable in character."

The reasonableness referred to above has relation to the period of limitations considering the type of action contemplated. Page 4 of Petitioner's Brief sets forth the

particular statute here in question. R.C.W. 4.16.020. No realistic argument can be made that even under the circumstances of this case, that a ten year statute of limitations is unreasonably short.

In *Atchafalaya Land Co. v. Williams Cypress Co.*, 258 U.S. 188, 66 L ed 559 (1921), holding that a six year statute of limitations does not violate due process, the court said:

> "The Act of Prescription was a proper exercise of sovereignty. The state could recognize, as it did recognize, that there might be claims derived from it, asserted or to be asserted, rightfully or wrongfully, involving conflicts which should be decided and quieted in the public interest, and therefore enacted the statute. And such is the rationale of the statute of limitations. They do not necessarily lessen rights of property or impair the obligation of contracts. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate, the requirement is legal, and its justice and wisdom have the testimony of the practices of the world."

Cooley's Constitutional Limitations Seventh Edition, Chap. XI, pages 520-521 (1903), discusses the question in the following manner:

> "Notwithstanding the protection which the law gives to the vested rights, it is possible for a party to debar himself of the right to assert the same in the courts, by his own negligence or laches. . . . Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establishes a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford

them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.

"When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases."

Thus we see that the Fourteenth Amendment due process clause offers no obstacle to the proposition advanced by the Supreme Court of the State of Washington in the case below, and supported by Respondent herein.

The cases of *Chapin v. Frye*, 179 U.S. 126, 45 L. ed 119 (1900); and *Winons Point Shooting Club v. Casperson*, 193 U.S. 188, 48 L. ed 675 (1903), stand for the proposition that the Fifth Amendment operates solely as a restriction on the power of the federal government, and contains no restrictions on the power of states. These cases have never been overruled and it is believed they are good law today.

However, even if the court should determine that the applicable section of the Fifth Amendment does restrict the power of the states, the case of *United States v. Dickinson*, 331 U.S. 745, 91 L ed 1789 (1947) implies that the provision:

"Nor shall private property be taken for public use without just compensation,"

would not prevent the Federal Government from acquiring an easement by prescription.

The decision was based on the conclusion that the six year statute of limitations had not in fact run. The clear implication, however, is that had it run, the Appellant would have been deprived of his property thereby.

It is therefore suggested that the Fifth Amendment is of no assistance to the Petitioner herein.

VII.

SUMMARY

Respondent concludes that the Supreme Court of the United States should deny the PETITION FOR A WRIT OF CERTIORARI.

This court is without jurisdiction because the alleged Federal question was not seasonably raised under the laws of the State of Washington, being first raised on the Petition for Rehearing before the Supreme Court of the State of Washington;

That, in any event, the doctrine of prescriptive easement is historically and realistically an essential part of the common law and statutory laws of the many states;

That the Fifth and Fourteenth Amendments offer no necessary or desireable obstruction to the proposition that the public may acquire an easement over private lands by prescription.

A decision in favor of the Petitioner would create havoc on the highways of this nation. Respondent will

not hazard a guess as to the number of miles of roadway where the public rights arose from prescriptive user. Suffice it to say that they are not inconsequential.

Respectfully submitted,

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